STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

V

HILLARY KNEISLER,

Defendant-Appellee.

UNPUBLISHED
January 9, 2007

No. 262384
Wayne Circuit Court
LC No. 04-500022

Before: Wilder, P.J., and Kelly and Borrello, JJ.

PER CURIAM.

The prosecution appeals by leave granted the circuit court's order reversing the district court's order denying defendant's motion to suppress evidence obtained from a breathalyzer test. We reverse and remand for further proceedings.

On appeal, the prosecution first argues that the circuit court was bound by this Court's prior decision[1] that the traffic stop in this case was proper. We agree. We review whether a lower court complied with a prior order of the Court of Appeals de novo. *Ashker v Ford Motor Co*, 245 Mich App 9, 13; 627 NW2d 1 (2001); *Kalamazoo v Dep't of Corrections* (*After Remand*), 229 Mich App 132, 134-135; 580 NW2d 475 (1998). The law of the case doctrine provides that "an appellate court's decision regarding a particular issue is binding on courts of equal or subordinate jurisdiction during subsequent proceedings in the same case." *People v Herrera* (*On Remand*), 204 Mich App 333, 340; 514 NW2d 543 (1994). "[A]n appellate court's determination of law will not be differently decided on a subsequent appeal in the same case if the facts remain materially the same." *People v Kozyra*, 219 Mich App 422, 433; 556 NW2d 512 (1996).

Here, the circuit court's order on remand from this Court's order was improper. In reversing the circuit court's original order, this Court held that the stop of defendant's vehicle was lawful and remanded this case to the circuit court to resolve whether the officers complied with 1994 AACS, R 325.2655(1)(e) (See *infra*). Specifically, this Court noted that "[t]he circuit court overstepped its review function and improperly substituted its judgment for that of the

[1] *People v Kneisler*, unpublished order of the Court of Appeals, entered December 13, 2004 (Docket No. 257215).

district court based solely on its review of the videotape." Despite this order, the circuit court again ruled that the stop of defendant's vehicle was unlawful.

Given that an appellate court's decision on a particular issue is binding on inferior courts, the circuit court was bound to follow this Court's order finding the stop of defendant's vehicle lawful. *Herrera*, *supra* at 340. Further, because the facts are identical to the first appeal, this Court should not disturb this Court's prior legal determination on this issue. *Cleveland Wells*, *supra* at 463. In light of this, it is irrelevant, as the circuit court claims, that it "didn't say the magic words the last time around." This issue is one of law, not of verbiage.

Notwithstanding this, we note that despite the circuit court's assertions to the contrary, the videotape clearly shows defendant swerving onto both the white dividing lines toward the right of her vehicle as well as the yellow line toward the left of the vehicle. Further, officer Shane Rebant stated at the evidentiary hearing that he saw defendant swerving out of her lane several times. Given that "erratic driving can give rise to a reasonable suspicion of unlawful intoxication so as to justify an investigatory stop," *People v Christie* (*On Remand*), 206 Mich App 304, 308; 520 NW2d 647 (1994), citing *Terry v Ohio*, 392 US 1; 88 S Ct 1868; 20 L Ed 2d 889 (1968), defendant's erratic driving clearly created the reasonable suspicion that defendant was intoxicated.

The prosecution next argues that the results of the breathalyzer test were reliable and should not have been suppressed. We agree. We review findings of fact regarding a motion to suppress evidence for clear error. *People v Fosnaugh*, 248 Mich App 444, 450; 639 NW2d 587 (2001). "A finding of fact is clearly erroneous if, after a review of the entire record, an appellate court is left with a definite and firm conviction that a mistake has been made." *People v Frohriep*, 247 Mich App 692, 702; 637 NW2d 562 (2001). However, the ultimate decision on a motion to suppress is reviewed de novo. *Fosnaugh*, *supra* at 450.

1994 AACS, R 325.2655(1)(e) (the observation rule) provides:

> A person may be administered a breath alcohol analysis on an evidential breath alcohol test instrument only after being observed for 15 minutes by the operator before collection of the breath sample, during which period the person shall not have smoked, regurgitated, or placed anything in his or her mouth, except for the mouthpiece associated with the performance of the test. [see *Fosnaugh*, *supra* at 447 n 1.]

"The usual rules of statutory construction apply to administrative rules." *People v Wujkowski*, 230 Mich App 181, 185; 583 NW2d 257 (1998). Further, "[t]here is no bright-line rule of automatic suppression of evidence where an administrative rule has been violated." *Id*. Regarding the 15 minute observation requirement, the purpose of this administrative rule "is to ensure the accuracy of [breathalyzer] tests." *Id*. Therefore, to be admissible, test results must be both "relevant and reliable." *Fosnaugh*, *supra* at 450. In light of this, "suppression of test results is required only when there is a deviation from the administrative rules that call into question the accuracy of the test." *Id*. A violation of the rule that does not affect the accuracy of the test does not warrant suppression of the test results. *Wujkowski*, *supra* at 187. See also, *People v Rexford*, 228 Mich App 371, 379; 579 NW2d 111 (1998)(holding that the failure to test

a breath alcohol machine for 13 days, in violation of a regulation requiring testing once a week, did not require suppression of defendant's breath test results).

In *People v Anstey*, 476 Mich 436; 719 NW2d 579 (2006), the Supreme Court reaffirmed the principle that neither dismissal of the charges against defendant nor suppression of the evidence was the appropriate remedy for the arresting officer's failure to give defendant a reasonable opportunity for an independent chemical test, in violation of defendant's statutory right.[2] *Anstey* reasoned that the exclusionary rule is "a harsh remedy designed to sanction and deter police misconduct where it has resulted in a violation of *constitutional* rights . . . ." *Antsey, supra* at 447-448 (internal quotation marks and citation omitted; emphasis in original). "This appeal involves a violation of a statutory right, not a constitutional right." *Id*. at 448 (footnote omitted). Similarly here, this appeal involves not a violation of a constitutional right, or even a statutory right, but only violation of an administrative rule. There is no authority presented by defendant that the administrative rule in question spawns a constitutional right. Under *Rexford* and *Anstey*, suppression of the test results is not the appropriate remedy.

In the instant case, both the testimony of Max Christie, the officer administering the test, and the videotape indicate that there was a technical violation of the observation rule. Although Christie claimed that he observed defendant from 3:25 a.m. until the breathalyzer test was administered at 3:51 a.m., he noted that he may have walked away from defendant or turned his back to her when he walked into the office. Christie also noted that he may have lost sight of defendant "for a split second" while calibrating the breathalyzer machine. Moreover, when asked to evaluate the whole observation period, Christie admitted that was looking at defendant only 96 percent of the time. Finally, the police station videotape shows a different officer taking defendant's fingerprints. Thus, there was a technical violation of the observation rule.

Notwithstanding this technical violation, the test results should not be suppressed. First, the challenged violation is of an administrative rule, and exclusion of the evidence does not apply under these circumstances. *Antsey, supra* at 447-448. Second, there was no evidence that defendant smoked, regurgitated, or placed anything into her mouth. Third, although it does not appear that Christie observed defendant while another officer took defendant's fingerprints, the videotape shows that defendant did not place anything into her mouth during this time. Thus, we conclude that despite the observational lapses in violation of the administrative rule, the totality of the evidence does not show that the reliability of the breathalyzer test was compromised. Given the nature of the evidence, we are not left with a definite and firm conviction that the district court made a mistake in finding that the test results were not compromised. *Frohriep, supra* at 702. Therefore, the district court's order denying defendant's motion to suppress the test results was proper, and the circuit court clearly erred in suppressing the results.

[2] "Under MCL 257.625a(6)(d), after having agreed to take the police-administered test, defendant was entitled to 'a reasonable opportunity to have a person of his or her own choosing administer' an independent chemical test." *Anstey*, *supra* at 439.

We reverse the circuit court's order which reversed the district court's order denying defendant's motion to suppress the evidence, and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Kurtis T. Wilder
/s/ Kirsten Frank Kelly
/s/ Stephen L. Borrello